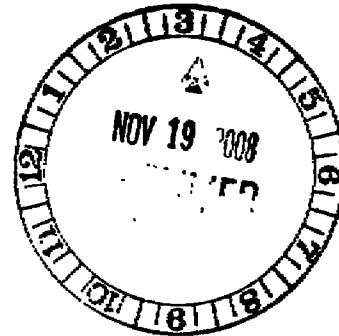


CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
206: 546-1936
FAX (206) 546-3739



18 November 2008
by express service

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E St., SW
Washington, D.C. 20024

Re: PYCO Industries, Inc. - Feeder Line Application -
Lines of South Plains Switching, Ltd. Co.,
F.D. 34890

filing of litigation status report

Dear Madam Secretary:

Enclosed for filing please find the original and ten copies of a Litigation Status Report on further developments in litigation on the matters which this Board indicated should first be addressed to state court in its Decision served Sept. 8, 2008, in F.D. 34890.

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. Mr. McFarland (SAW) (w/encls)
Mr. McLaren (PYCO) (w/encls)

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BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. --)
Feeder Line Application --)
Lines of South Plains Switching, Ltd. Co.)

F.D. 3489



Litigation Status Report

This is a Status Report concerning state court litigation pursuant to this Board's Decision served September 8, 2008, in this proceeding.

In this Board's Decision served September 8, 2008, this Board required SAW to quitclaim all its interests in the "Burris" trackage to PYCO by October 8, 2008. This Board indicated that it would leave to Texas state courts the question of whether BNSF in 1999 conveyed some ten mainline switches to SAW, but that if BNSF did convey those switches to SAW, then the switches must be conveyed to PYCO. Slip op. at pp. 10-11.¹ In explaining that

¹ SAW originally acquired its interests from BNSF in Lubbock pursuant to South Plains Switching, Ltd. Co. - Acquisition Exemption - BNSF Railway, F.D. 33743 (Sub-no. 1), served July 15, 1999. That notice indicated that SAW was authorized to acquire certain "incidental trackage rights" on the BNSF mainline, but not actual ownership. Pursuant to this authorization, BNSF issued to SAW a quitclaim deed and bill of sale under which SAW now claims to own some ten mainline switches. PYCO understands that SAW contends the switches are "turnouts" relating to the lines conveyed to it by the BNSF bill of sale. SAW evidently relies on the fact that the bill of sale did not specify any particular "cut-point" between the various tracks being conveyed to SAW and the BNSF mainline. BNSF evidently relies on language indicating it did not convey anything in or on its mainline.

In PYCO Industries - Feeder Line Application - Lines of South Plains Switching, Ltd., F.D. 34890, served Sept. 8, 2008, slip op. p. 10, this Board stated that since neither SAW nor PYCO addressed the issue whether this Board's July 14, 1999

if SAW acquired the switches from BNSF then the switches should have been conveyed to PYCO, this Board indicated that it felt the matter was a "tempest in a teapot." This is a report on the status of the state court litigation at this time, tendered because it may be germane to further proceedings in F.D. 34890.

In characterizing the dispute over title to the mainline switches as a "tempest in a teapot," PYCO understands the Board to believe that the issue of the switches will be moot if the Texas state court determines that BNSF never conveyed the switches, that the Board elects to defer ruling on a potentially moot question, and that the Board believes this will have no impact on rail operations.

The Board in its decision also suggested that the parties and BNSF negotiate any compensation issues. Decision at p. 11. PYCO understands that this is a recommendation that the parties attempt to negotiate a settlement. PYCO understands SAW to be

authorization in F.D. 33743 (sub-no. 1) authorized conveyance by BNSF of the mainline switches, this Board would "presume" the conveyance authorized. With respect, a presumption is not appropriate here. BNSF could not lawfully purport to transfer to SAW any interest in its mainline pursuant the STB authorization other than what this Board authorized, and this Board only authorized a conveyance of incidental trackage rights. The absence of an argument is not a concession or an admission. The scope of the authority granted in F.D. 33743 (sub-no. 1) was not before the Board in F.D. 34890 for purposes of the decision served Sept. 8, 2008. Since PYCO had originally but unsuccessfully sought to revoke the entire exemption in F.D. 33743 (sub-no.1) (see Decision in that docket served Sept. 15, 2006), the Board should not have presumed the parties agreed that it included any arbitrary portion of the BNSF mainline.

unwilling to discuss settlement.' SAW instead demands that PYCO pay SAW more money. But PYCO has already paid for the switches (if they were owned by SAW) when it bought all interests of SAW (including but not limited to specifically all interests that SAW itself claimed to own) at closing on the conveyance ordered in F.D. 34890; PYCO owes no further compensation to SAW.

The quitclaim deed and bill of sale SAW tendered to PYCO for Burris omit any interest SAW holds in the mainline switches at Burris.' In an email exchange on October 8 and 9, SAW's counsel confirmed that SAW was not conveying any interest it held in the switches to PYCO, and that it would not convey such interest to PYCO at any point unless paid additional compensation. See Exhibit C (Oct. 8-9 email exchange). In short, PYCO has been unable under the STB decision of September 8 to resolve any

² Although this Board's September 8, 2008 decision suggested the parties negotiate, SAW basically declined to negotiate with PYCO. See email exchange attached as Exhibit A.

³ PYCO requested review of a draft deed in advance to work out issues as to form. SAW refused to provide a draft deed, claiming lack of time. PYCO did not have any input into the form of deed or bill of sale in the instruments tendered by SAW and does not accept the form as correct. The deed and bill of sale as tendered by SAW to PYCO are attached as Exhibit B.

The bill of sale omits track materials from one of the three tracks conveyed (its property description ends with a semicolon, and despite request by PYCO, SAW refuses to address the defect, saying PYCO should look to the quitclaim deed). Email exchange, exhibit C (Oct. 8) & D (October 9). The documentation also is drafted to omit any interest of SAW in mainline switches connecting the Burris trackage to the BNSF mainline, and SAW's correspondence confirms that this omission is intentional.

matter with SAW, and SAW continues to claim switches between the BNSF mainline and the former SAW system essential to provide rail service to PYCO's rail customers in Lubbock.

SAW continues to pursue litigation against BNSF Railway in Texas state court concerning the switches. Although SAW has not named PYCO as a defendant, the litigation impacts PYCO because SAW is claiming current title to the switches, is seeking \$75,000 to \$80,000 compensation per switch, and is demanding exemplary damages for "trespass" over the switches by BNSF and, after November 2007, by PYCO through PYCO's subsidiary Plainsman Switching.

In one filing, SAW asserts a claim against BNSF for market, replacement, or "intrinsic" value of the switches. None of these "standards" of value is the same as "net liquidation value," which is the standard used by this Board to value rail property pursuant to 49 U.S.C. 10907 and as used by this Board in F.D. 34890. Using its non-STB valuation arguments, SAW claims the total damages for nine of the ten switches is \$668,000. In another filing in the case, Larry Wisener, SAW's president, claims that the switches are worth \$75,000 to \$80,000 each.⁴ SAW's claim for exemplary (punitive) damages is evidently on top

⁴ Affidavit of Larry Wisener in 99' District Court NO. 2007-539,788 at unnumbered p. 5. Exhibit F. Also included in Exhibit F is the Plaintiff's Third Supplemental Petition asserting "market value" damages of \$668,000 for nine of the switches.

of this.

In order to protect its interests (including but not necessarily limited to PYCO's ownership of the switches if they are not owned by BNSF, and ability to operate a common carrier railroad by use of the switches without being liable for trespass damages), PYCO has moved to intervene in the state court proceeding. Exhibit G. SAW has opposed that intervention, and PYCO understands that the Texas state court will rule on PYCO's intervention motion no earlier than December 1, 2008. In addition, the Texas state court has scheduled SAW's case for trial on April 6, 2009. Exhibit H.

PYCO has also filed a petition for judicial review from this Board's September 8, 2008, ruling. See PYCO Industries, Inc. v. STB, D.C. Cir. No. 08-1347. Without limitation, the Board erred in failing to clarify that SAW must convey any interest it claims in the switches to PYCO (i.e., quitclaim any interest to PYCO) and by exposing PYCO to damage claims arising from state court litigation. The Hobbs Act requires that petitions for review must be filed within 60 days of this Board's decision of September 8, 2008. PYCO cannot wait to petition for review until it sees if, after trial on April 6, 2009 (if the trial occurs then), the state court moots the underlying questions by finding that BNSF Railway never conveyed the switches in the first place.

Because SAW claims use of the switches by PYCO is trespass

and further demands payment of "compensation" as a condition of clarifying that any interest it holds in the switches now belongs to PYCO, this matter unfortunately is considerably more than a "tempest in a teapot." If the state court rules that BNSF -- not SAW -- owns the switches, then the issues SAW raises may be moot as to PYCO (as the Board apparently believes), but PYCO will still incur the risks and costs of otherwise unnecessary litigation. On the other hand, if the state court rules that SAW owns the switches, then the issues SAW raises will not be moot, and PYCO will still be faced with SAW's demands for compensation and allegations of trespass. These matters should have been resolved definitively in PYCO's favor by the Board.

PYCO acquired all of SAW, including Burris. For the Board to order the Burris properties conveyed, but for SAW to continue to claim that it still owns the "gates" (switches) essential to operate the lines conveyed to PYCO, including the mainline switches at Burris, is Kafkaesque. Moreover, since PYCO has already paid SAW for all its interests in the rail properties in Lubbock (including Burris), this necessarily included any interest SAW held in the mainline switches.⁵ It is clearly capricious to subject a successful feeder line applicant to indeterminate claims for compensation for facilities obviously

⁵ If SAW wants more compensation, it needs to reopen F.D. 34890 for that purpose, but PYCO would oppose reopening for a host of reasons.

essential to operation, and to allegations in state court proceedings that use of mainline switches by it constitutes a trespass on property owned by the former rail provider it bought out.

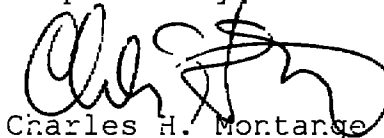
There is no need and no reason for a state court (or STB for that matter) to address the issue of who owns the switches to resolve the issue as to PYCO. This Board orders conveyance by quitclaim deed; this does not require entities like SAW to warrant or to prove title, or to have any title at all. All the SAW's of the world need do is to quitclaim their interests, leave the scene, and litigate over it no more. They must be required to do so when the feeder line applicant makes its case, as was done here.

Whatever BNSF conveyed to SAW in 1999, SAW cannot now claim legitimately to own after the effective date of closing (November 9, 2007) in the feeder line proceeding, nor can SAW legitimately claim any compensation from PYCO for any interest held by SAW in the switches, nor can SAW legitimately seek damages for any alleged "trespass" due to PYCO's use of the switches after November 9, 2007. (Any SAW claim for damages before that date is before this Board in another proceeding, namely F.D. 35111.)

⁶ SAW has brought state court litigation duplicative of the issues it has tendered this Board in F.D. 35111. West Texas & Lubbock Railway and PYCO have removed this litigation to federal court. PYCO has filed a status report in F.D. 35111 discussing this litigation.

Because this Board directed the parties to litigate about ownership of the switches in state court, PYCO without waiver of its position above is so litigating (provided the state court permits PYCO to intervene). But any litigation by PYCO in state court is without waiver of PYCO's right to bring the matter back to this Board for relief consistent with PYCO's position set forth above. Moreover, any litigation by PYCO in state court is also without prejudice to PYCO's petition for judicial review of STB's failure to afford PYCO relief concerning the switches in the first instance.

Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
Counsel for PYCO Industries, Inc.

Of counsel:

Gary McLaren
Phillips & McLaren
3305-66th St., Suite 1A
Lubbock, TX 79413

- Exhibit A - Sept. 30/Oct. 1 emails (PYCO and SAW counsel)
- Exhibit B - SAW cover letters, quitclaim deed and b.o.s.
- Exhibit C - Oct. 8-9 emails (PYCO and SAW counsel)
- Exhibit D - Oct. 9 emails (PYCO and SAW counsel)
- Exhibit E - SAW's Fifth Amended Original Petition in state court
- Exhibit F - Wisener affidavit in state court; Third Supplemental Petition to Fifth Amended Original Petition in state court
- Exhibit G - PYCO intervention petition in South Plains v. BNSF, 99th District Court of Lubbock County No. 2007-539,788, filed on Oct. 14, 2008
- Exhibit H - Nov. 10 letter from state court scheduling trial for April 6, 2009.

Certificate of Service

I hereby certify service on November 18, 2008, by deposit in express next business day delivery to Thomas McFarland, 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112 (for SAW and Choo Choo).

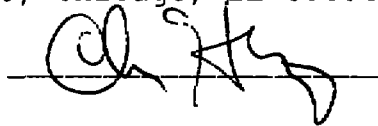


Exhibit A -- Sept. 30/Oct. 1 emails (PYCO and SAW counsel)

Charles Montange

From: "Charles Montange" <c.montange@verizon.net>
To: <mcfarland@aol.com>
Cc: "Gary McLaren" <gmclaren@sbcglobal.net>
Sent: Wednesday, October 01, 2008 11:19 AM
Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

Tom.

Your client supplied a customary NLV inventory to the Board which necessarily included all switches. That is where they were. As to the "back and forth," STB in its decision indicated that the parties should attempt to negotiate a solution. That is what I have been attempting with you, through this email exchange, insofar as PYCO's interest is involved in your client's lawsuit with BNSF. But I will treat your email now as cutting off negotiation, in preference for litigation. PYCO and I construe the STB decision to make clear that either BNSF or PYCO now own the switches, no additional compensation is due to SAW for same, and PYCO may use the switches without further payment to SAW (or BNSF). If SAW wants additional compensation for switches, it needs to have STB reopen its valuation decision in F.D. 34890. We of course would oppose additional NLV compensation.

C. Montange, for PYCO

----- Original Message -----

From: mcfarland@aol.com
To: c.montange@verizon.net
Cc: gmclaren@sbcglobal.net; c.montange@verizon.net; mcfarland@aol.com; gmclaren@sbcglobal.net
Sent: Wednesday, October 01, 2008 9:42 AM
Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

These switches were not in that inventory. Show me where they were. This back-and-forth is not productive. The September 8 decision rightly leaves this matter initially to the Texas Court.Tom

Thomas F. McFarland
 Thomas F. McFarland, P.C.
 208 S. LaSalle St., #1890
 Chicago, IL 60604-1112
 (312) 236-0204
 (312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <c.montange@verizon.net>
To: mcfarland@aol.com
Cc: Gary McLaren <gmclaren@sbcglobal.net>
Sent: Wed, 1 Oct 2008 11:08 am
Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

Tom, let me try this one more time. In the feeder line proceeding, PYCO sought to acquire all of SAW ("all-SAW"). SAW responded with, among other things, its inventory of physical assets. PYCO valued that inventory. SAW in essence did not dispute that valuation, which basically used values from other SAW submissions. STB established the value of SAW's inventory. PYCO paid SAW the value set by STB for all-SAW. It is too late for SAW to argue that it did not include switches in its inventory. While PYCO has other arguments, equally dispositive, this one seems to me to do it. That is why this matter is within the purview of STB, and STB has already ruled. Since I think it just runs up attorneys fees on both sides to persist in this part of the dispute, I do hope your side will reconsider.

10/22/2008

----- Original Message -----

From: mcfarland@qfand.com

To: charlesmontange@pyco.com

Sent: Wednesday, October 01, 2008 6:15 AM

Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

No, but the State Court must first determine whether they were conveyed. If so, they must be re-conveyed, but for value.....T.

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 S. LaSalle St., #1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <charlesmontange@pyco.com>

To: mcfarland@qfand.com

Cc: Gary McLaren <gmclaren@pyco.com>

Sent: Tue, 30 Sep 2008 5:01 pm

Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

With respect, as to the switches, this mixes apples and oranges. STB has said that the foundational issue of whether BNSF conveyed the switches to SAW is a matter of contract for state court. However, the decision further indicates that if the state court determines the switches were conveyed, then that interest must be conveyed to PYCO. Is SAW taking issue with that portion of the STB decision?

----- Original Message -----

From: mcfarland@qfand.com

To: charlesmontange@pyco.com

Cc: gmclaren@pyco.com, charlesmontange@pyco.com, tom@pyco.com, garymclaren@pyco.com

Sent: Tuesday, September 30, 2008 2:53 PM

Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

It will not be possible to get you drafts of the bill of sale and quitclaim deed before the deadline due to the unavailability of our real estate consultant. I don't agree with your reading of the STB's decision on the switches. That matter is in Texas Court where it belongs.

Tom

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 S. LaSalle St., #1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <charlesmontange@pyco.com>

To: mcfarland@qfand.com

Cc: Gary McLaren <gmclaren@stb.com>
 Sent: Tue, 30 Sep 2008 4:47 pm
 Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

Hello Tom.

1. Thanks for your response. I would appreciate an opportunity to review (and to have Gary McLaren review) a draft of the deed and bill of sale before finals are tendered, in order to ensure that problems possible of resolution are addressed with minimum headache for all concerned. This will hopefully help both sides minimize inadvertent defects.
2. The STB decision requests the parties to negotiate a solution to the switch dispute. The decision indicates that the issue of whether BNSF originally conveyed the switches to SAW is for TX state courts, but that if SAW acquired the switches (BNSF denies SAW did), then SAW's interest now belongs to PYCO and should have been conveyed at the same time (Nov. 9, 1987) as the original SAW property was conveyed. In other words, the switches are now owned either by BNSF or PYCO. In the TX state court proceeding Mr. Gorsuch on behalf of SAW filed against BNSF, the latest version of the SAW petition (complaint) alleges that SAW owns the switches, and on its face clearly claims damages for the period after Nov. 9, 2007 (when PYCO acquired the SAW properties). Thus the allegations and relief sought in the current version of the SAW state court complaint are contrary to a fair reading of the subsequent STB decision. It seems easiest to resolve this by a conveyance of whatever interest SAW has in the switches, but if you have another alternative, I request that you so indicate. We would prefer working this out without having to intervene to ensure consistency with this aspect of the STB decision and otherwise to protect our interests. Thanks again.

----- Original Message -----

From: gmclaren@stb.com
 To: cmontange@pyco.com
 Cc: cmontange@pyco.com; dwolton@pyco.com; jgorsuch@pyco.com
 Sent: Tuesday, September 30, 2008 2:25 PM
 Subject: Re: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

You will get a quitclaim deed and bill of sale on the Burris property by the deadline in the STB decision. The decision does not require a conveyance of the switches.

Tom

Thomas F. McFarland
 Thomas F. McFarland, P.C.
 208 S. LaSalle St., #1890
 Chicago, IL 60604-1112
 (312) 236-0204
 (312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <cmontange@pyco.com>
 To: gmclaren@stb.com
 Sent: Mon. 29 Sep 2008 6:32 pm
 Subject: Fw: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

----- Original Message -----

From: Charles McLain

To: Hank Lundberg, General Counsel

Cc: Gary McLain

Sent: Monday, September 29, 2008 4:30 PM

Subject: SAW, PYCO, Lubbock, STB Decision in F.D. 34890 served Sept. 8, 2008

Hello Tom:

Pursuant to the Board's Decision served Sept. 8, 2008 in F.D. 34890, I overnited you a letter dated 16 September suggesting preparation of a quitclaim deed and bill of sale for the Burris property from SAW to PYCO, and also a conveyance of any interest of SAW in the various switches (between former SAW property and BNSF property) effective from Nov. 9, 2007. You have not responded to my letter, but I note that you have filed a petition for review of the Sept. 8, 2008 decision, and SAW in Lubbock apparently has filed (but perhaps not yet served) a complaint against WTL, and may be continuing to pursue litigation against BNSF over the switches. The STB decision called for the Burris trackage to be conveyed by deed and bill of sale by Oct. 8, 2008. STB suggests that the parties negotiate a solution concerning the switches, but also notes, in effect, that any claim of SAW now belongs to PYCO pursuant to the feeder line sale

Is SAW prepared to convey to PYCO by quitclaim deed and/or appropriate bill of sale its interests in the Burris trackage by Oct. 8, 2008?

Is SAW prepared to convey to PYCO by appropriate quitclaim instrument all its interests (if any) in the various switches SAW has put at issue in SAW v BNSF, Tx District Court -- Lubbock, no. 2007-539788 (or elsewhere)?

I note for the record that your petition for review of the Board's Sept. 8, 2008 Decision does not result in any automatic stay of that Decision. 28 USC 2349(b). The aspects of the Decision for which SAW has petitioned for review appear to PYCO to be within the law and well supported by the record. For these and other reasons, SAW is unlikely to prevail on the merits, or to obtain a stay pending review under the customary appellate (or STB) standards for a stay (Virginia Petroleum Jobbers case) should it seek one.

We need to see a draft quitclaim deed and bill of sale promptly and work out logistics if the conveyance is to comply with the STB order (i.e., be completed by Oct. 8, 2008). Please let me know by close of business Wednesday, Oct. 1, 2008, if SAW is prepared to issue the required quitclaims. Thanks.

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Find phone numbers fast with the [New York Times](#) [New York Times](#)

Find phone numbers fast with the [New York Times](#) [New York Times](#)

Exhibit B - SAW cover letters, quitclaim deed and b.o.s.

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LA SALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

October 7, 2008

By UPS overnight mail

Charles H. Montange, Esq.
426 N.W. 162nd Street
Seattle, WA 98177

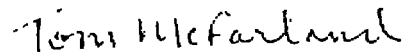
Dear Charles:

This refers to your letter to me of September 16, 2008.

A quitclaim deed and bill of sale to property at Burris, TX are being sent to you under separate cover.

SAW hereby declines your request for conveyance or assignment of SAW's interest in switches to PYCO. As found in the Board's decision in Finance Docket No. 34890 served September 8, 2008, disposition of the switches is initially a matter for a Texas Court.

Very truly yours,



Thomas F. McFarland
*Attorney for South Plains
Switching, Ltd. Co.*

TMcf kl wp8 0\1290\lrCIIM1

cc: Messrs. Larry Wisener
Dennis Olmstead
James Gorsuch, Esq.

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

October 7, 2008

By UPS overnight mail

Charles H. Montange, Esq.
426 N.W. 162nd Street
Seattle, WA 98177

Re: Conveyance of Burris, TX Property under Protest

Dear Charles:

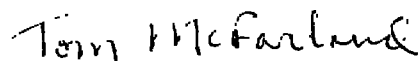
Hereby transmitted are quitclaim deed and bill of sale conveying the interest of South Plains Switching, Ltd. Co. (SAW) in right-of-way land and track at Burris, TX (Burris property) to PYCO Industries, Inc. (PYCO).

This conveyance is being made under protest, solely because SAW has been ordered to make the conveyance in a decision of the Surface Transportation Board (STB) in STB Finance Docket No. 34890, *PYCO Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd. Co.*, served September 8, 2008.

SAW has filed a Petition for Judicial Review in the United States Court of Appeals for the District of Columbia Circuit directed at the portion of that STB decision that ordered SAW to make that conveyance. (DC Cir., No. 08-1309, *South Plains Switching, Ltd. Co. v. Surface Transportation Board, et al.*, filed on September 22, 2008.

You are reminded that if PYCO were to convey the Burris property to a third person during the pendency of that Petition for Judicial Review, and if the STB's order were to be set aside and annulled in that proceeding, any such PYCO conveyance would be annulled and set aside by virtue of that action of the Court of Appeals. *See Busboom Grain Co. v. ICC*, 830 F.2d 74 (7th Cir. 1987). ("A judgment setting aside the ICC's decision restores the status quo ante ...").

Very truly yours,



Thomas F. McFarland
*Attorney for South Plains
Switching, Ltd. Co.*

TMcF kl-wp8 0\1334\ltrCHM1

cc: Messrs. Larry Wisener
Dennis Olmstead
James Gorsuch, Esq.

After Filing Return to PYCO INDUSTRIES, INC., P. O. Box 841, Lubbock, Texas 79405

QUITCLAIM DEED

**THE STATE OF TEXAS §
 § KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF LUBBOCK §**

THAT SOUTH PLAINS SWITCHING, LTD. CO., A Texas Limited Liability Company, whose address is P. O. Box 64299, Lubbock, Texas 79464-4299, Grantor, and by these presents does REMISE, RELEASE and QUITCLAIM, without any covenants of warranty whatsoever, and without recourse to the Grantor, its successors and assigns, CONVEY unto **PYCO INDUSTRIES, INC.,** located at 2901 Avenue A, Lubbock, Lubbock County, Texas, 79404, Grantee, its successors and assigns, all of Grantor's right, title and interest, if any, in real estate and improvements located in the County of Lubbock, State of Texas, as such real property is more particularly described in detail in Exhibit "A" consisting of two (2) pages attached hereto and made a part hereof.

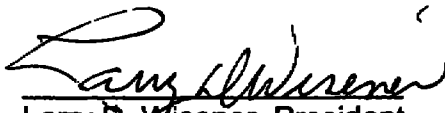
Subject, however, to all valid existing interest of third parties in the property, including but not limited to, restrictive covenants, mineral and other reservations, existing easements, rights of way, prescriptive rights, and other encumbrances whether of record or not.

By the acceptance of this deed, Grantee takes the Railroad Easement and remaining real estate, if any, "**AS IS**". Grantor has not made and does not make any representations as to the physical condition, layout footage, expenses, zoning, operation, or any other matter affecting or related to the Property, and Grantee hereby expressly acknowledges that no such representations have been made. Grantor makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a particular purpose or otherwise except as set forth and limited herein. Any implied warranties are expressly disclaimed and excluded. All warranties that might arise by common law as well as the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded.

When the context requires, singular nouns and pronouns include the plural.

EXECUTED on this the 1st day of October, 2008

SOUTH PLAINS SWITCHING, LTD. CO.


Larry D. Wisener, President

THE STATE OF TEXAS §
§
COUNTY OF LUBBOCK §

This instrument was acknowledged before me on this the 1st day of October, 2008, by Larry D. Wisener, President of **SOUTH PLAINS SWITCHING, LTD., CO**, Texas Limited Liability Company, on behalf of said Company.


NOTARY PUBLIC, STATE OF TEXAS

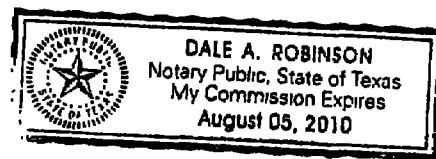


Exhibit "A"

SPUR TRACKS DESIGNATED AS ICC TRACK NUMBER 4, ICC TRACK NUMBER 7 AND ICC TRACK NUMBER 12 LYING IN OR NEAR THE RAILWAY STATION OF BURRIS, TEXAS, ALONG AND CONTIGUOUS TO THE MAIN LINE RIGHT OF WAY BETWEEN MILEPOST 680.05 AND MILEPOST 680.36 AS SHOWN IN THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY RECORDS (FORMERLY THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY) AS THE LUBBOCK SUBDIVISION AND ARE LOCATED WITHIN SURVEY 11, BLOCK S, G. C. & S. F. RWY SURVEY, IN LUBBOCK COUNTY, TEXAS THAT WERE ACQUIRED IN QUITCLAIM DEED DATED MAY 18, 1999 AND RECORDED IN THE LUBBOCK COUNTY DEED RECORDS AT VOLUME 6814 AT PAGE 156 AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

ICC TRACK NUMBER 4 AS LISTED SECOND AT PAGE 164 IN VOLUME 6814 OF THE LUBBOCK COUNTY DEED RECORDS WITH THE LEGAL DESCRIPTION THEREIN BEING COPIED AND INCORPORATION HEREIN WITH CORRECTIONS ADDED THERETO AS THE DESCRIPTION FOR ICC TRACK NUMBER 4:

BEGINNING AT THE INTERSECTION OF TRACK NUMBER 4 WITH THE NORTHERLY RIGHT OF WAY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S MAIN LINE RIGHT OF WAY OPPOSITE MILEPOST 680.05 BEING ENGINEERING STATION 10287+87, MAIN LINE STATIONING, LYING IN ~~LOT~~ SURVEY 11 BLOCK S, G. C. & S. F. SURVEY;

THENCE IN A GENERALLY SOUTHEASTERLY DIRECTION THROUGH ~~LOT~~ SURVEY 23, 11 BLOCK S, G. C. & S. F. SURVEY TO ENGINEERING STATION 10278+82 MAIN LINE STATIONING, OPPOSITE MILEPOST 680.22 AND THE END OF SAID TRACK 4;

ICC TRACK NUMBER 7 AS LISTED FOURTH AT PAGE 164 IN VOLUME 6814 OF THE LUBBOCK COUNTY DEED RECORDS WITH THE LEGAL DESCRIPTION THEREIN BEING COPIED AND INCORPORATION HEREIN WITH CORRECTIONS ADDED THERETO AS THE DESCRIPTION FOR ICC TRACK NUMBER 7:

BEGINNING AT THE INTERSECTION OF TRACK NUMBER 7 WITH THE SOUTHERLY RIGHT OF WAY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S MAIN LINE RIGHT OF WAY OPPOSITE MILEPOST 680.36 BEING ENGINEERING STATION 10271+09, MAIN LINE STATIONING, LYING IN ~~LOT~~ SURVEY 11, BLOCK S, G. C. & S. F. SURVEY:

THENCE IN A GENERALLY NORTHWESTERLY DIRECTION THROUGH ~~LOT~~ SURVEY 23, 11 BLOCK S, G. C. & S. F. SURVEY TO ENGINEERING STATION 18+26 TRACK NUMBER 7 STATIONING, OPPOSITE MILEPOST 680.18 AND THE END OF SAID TRACK 7;

ICC TRACK NUMBER 12 AS LISTED FIFTH AT PAGE 164 IN VOLUME 6814 OF THE LUBBOCK COUNTY DEED RECORDS WITH THE LEGAL DESCRIPTION THEREIN BEING COPIED AND INCORPORATION HEREIN WITH CORRECTIONS ADDED THERETO AS THE DESCRIPTION FOR ICC TRACK NUMBER 12:

BEGINNING AT THE INCEPTION OF TRACK NUMBER 12 OUT OF TRACK NUMBER 7, OPPOSITE MILEPOST 680.26 BEING ENGINEERING STATION 8+24, TRACK NUMBER 7 STATIONING, LYING IN ~~LOT~~ SURVEY 11, BLOCK S, G. C. & S. F. SURVEY;

THENCE IN A GENERALLY NORTHWESTERLY DIRECTION THROUGH ~~LOT~~ SURVEY ~~23~~ 11, BLOCK ~~5~~ S, G. C. & S. F. SURVEY TO ENGINEERING STATION 15+40 TRACK NUMBER 7 STATIONING, OPPOSITE MILEPOST 680.13 AND THE END OF SAID TRACK 12;

LESS & EXCEPT;

THE BNSF RAILWAY COMPANY (FORMER AT&SF) MAIN TRACK CORRIDOR RIGHT-OF-WAY IS EXCLUDED FROM THESE DESCRIPTIONS.

SEPTEMBER 24, 2008

BILL OF SALE

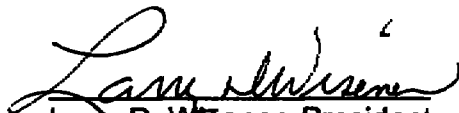
KNOW ALL MEN BY THESE PRESENTS, that **THAT SOUTH PLAINS SWITCHING, LTD. CO.**, A Texas Limited Liability Company, whose address is P. O. Box 64299, Lubbock, Texas 79464-4299, ("Grantor"), does hereby transfer to **PYCO INDUSTRIES, INC.**, located at 2901 Avenue A, Lubbock, Lubbock County, Texas, 79404, ("Grantee"), the rail, ties, ballast, and all other associated track materials consisting of the railroad trackage identified within the Railroad Easement attached as Exhibit "A" hereto.

GRANTOR TRANSFERS SAID PROPERTY IN THE CONDITION IN WHICH IT EXISTS ("AS IS") AND EXPRESSLY DISCLAIMS, EXCEPT AS EXPRESSLY PROVIDED HEREIN, ALL WARRANTIES EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, WARRANTIES OR MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND GRANTOR SHALL NOT BE LIABLE TO GRANTEE FOR ANY CLAIM, LOSS OR DAMAGE OR EXPENSE OF ANY KIND BECAUSE OF THE CONDITION OF SAID PROPERTY, EXCEPT THAT GRANTOR WARRANTS TO GRANTEE ITS TITLE TO SAID PROPERTY.

TO HAVE AND TO HOLD the same unto said Grantee its successors and assigns forever.

IN WITNESS WHEREOF, this instrument is executed by Grantor as of the 1st Day of October 2008.

SOUTH PLAINS SWITCHING, LTD. CO.


Larry D. Wisener, President

THE STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

This instrument was acknowledged before me on this the 1st day of October, 2008, by Larry D. Wisener, President of **SOUTH PLAINS SWITCHING, LTD., CO.**, Texas Limited Liability Company, on behalf of said Company.


NOTARY PUBLIC, STATE OF TEXAS

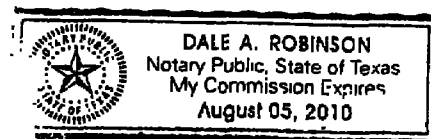


Exhibit "A"

TRACK NUMBER ICC 4 (CLIC NO. 0352)

THE ORIGINAL POINT OF SWITCH FOR ICC TRACK NUMBER 4 IS LOCATED IN THE SIDING TRACK AT THE RAILROAD STATION OF BURRIS, TX (ICC TRACK NUMBER 1) OPPOSITE MAIN LINE MILE POST 679+4715' IN THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR.

IT IS THE INTEND OF THIS DESCRIPTION TO CONVEY THAT PORTION OF ICC TRACK NUMBER 4 LOCATED WITHIN THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR BETWEEN THE RAILROAD CLEARANCE POINT (14' TRACK CENTERS) FOR ICC TRACK NUMBER 4 WITH THE SIDING TRACK (ICC TRACK 1) IN THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR ON THE NORTHERLY END AND THE POINT WHERE ICC TRACK NUMBER 4 EXITS THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR TO THE SOUTHEAST IN THE NORTHERLY RIGHT OF WAY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S MAIN LINE RIGHT OF WAY OPPOSITE MILEPOST 680.05 BEING ENGINEERING STATION 10287+87, MAIN LINE STATIONING, LYING IN SURVEYS 4 AND 11, BLOCK S, G. C. & S. F. SURVEY;

TRACK NUMBER ICC 7 (CLIC NO. 0355)

THE ORIGINAL POINT OF SWITCH FOR THIS TRACK IS LOCATED IN THE BNSF MAIN TRACK AT THE RAILROAD STATION OF BURRIS, AT MAIN LINE MILE POST 678+2195' IN THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR.

IT IS THE INTEND OF THIS DESCRIPTION TO CONVEY THAT PORTION OF ICC TRACK NUMBER 7 LOCATED WITHIN THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR BETWEEN THE RAILROAD CLEARANCE POINT (14' TRACK CENTERS) FOR ICC TRACK NUMBER 7 WITH THE MAIN TRACK ON THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR ON THE SOUTHERLY END AND THE POINT WHERE ICC TRACK NUMBER 7 EXITS THE BURLINGTON NORTHERN SANTA FE COMPANY'S LUBBOCK SUBDIVISION MAIN LINE CORRIDOR TO THE NORTHWEST IN THE SOUTHERLY RIGHT OF WAY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S MAIN LINE RIGHT OF WAY OPPOSITE MILEPOST 680.36 BEING ENGINEERING STATION 10271+09, MAIN LINE STATIONING, LYING IN SURVEY 11, BLOCK S, G. C. & S. F. SURVEY;

September 25, 2008

Exhibit C - Oct. 8-9 emails (PYCO and SAW counsel)

Charles Montange

From: "Charles Montange" <c.montange@verizon.net>
To: <mcfarland@aol.com>
Cc: "Gary McLaren" <gmclaren@sbcglobal.net>, <gkring@pycoindustries.com>; <rlacy@pycoindustries.com>
Sent: Thursday, October 09, 2008 10:38 AM
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

PYCO of course disagrees and reserves all rights.

----- Original Message -----

From: c.montange@verizon.net
To: c.montange@verizon.net
Cc: klobbba@ameritech.net; cawlandj@att.net; deb.dwyer@att.net; saw@raegroup.com
Sent: Thursday, October 09, 2008 6:30 AM
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

The answer to both of your questions in number one is yes.

Tom

Thomas F. McFarland
 Thomas F. McFarland, P.C.
 208 S. LaSalle St., #1890
 Chicago, IL 60604-1112
 (312) 236-0204
 (312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <c.montange@verizon.net>
To: mcfarland@aol.com
Cc: Gary McLaren <gmclaren@sbcglobal.net>
Sent: Wed, 8 Oct 2008 1:09 pm
Subject: Fw: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

Just after I sent the message below to you, an envelope arrived from you conveying to me a quitclaim deed and bill of sale, evidently executed on October 1, 2008, by Larry Wisener as President of SAW, for the Burris property. I will forward same to PYCO for immediate review of the property description.

I have two comments, one of which is a clarification question and the second is to note that the bill of sale legal description appears to omit a page, and needs to be corrected immediately.

1. You provided two cover letters. The first cover letter, which is quite short, states that "SAW hereby declines [PYCO's] request for conveyance of assignment of SAW's interest in switches to PYCO As found in the Board's decision in Finance Docket No. 34890 served Sept. 8, 2008, disposition of the switches is initially a matter for a Texas Court." This raises an issue which requires clarification

A fair reading of the STB decision does in fact indicate that the question whether BNSF ever conveyed the switches to SAW in the first place is a question for Texas State Court. STB did not see any need to determine whether BNSF conveyed the switches to SAW in the first place. However, STB indicated that if SAW did receive the switches, it must convey them to PYCO. In our October 1 email exchange, you acknowledge that is the case.

10/22/2008

In your October 1 email exchange with me, you seemed to suggest that SAW would only convey the switches for value. The SAW track inventory for NLV purposes used by all parties and STB in FD 34890 included all switches. SAW has accordingly been fully compensated by PYCO for all interests owned by SAW.

SAW has now tendered a quitclaim deed and bill of sale to PYCO purportedly for the Burris property (as I said, I am forwarding same to PYCO for review). Is it SAW's position that this deed and bill of sale does NOT include any interest of SAW (if SAW has an interest) in switches from the BNSF mainline to the Burris trackage? If so, is it your position that SAW must be provided additional compensation to convey the switches to PYCO, if Texas State Court determines that BNSF in fact conveyed the switches to SAW?

2. The bill of sale legal description should be two pages, covering tracks 4, 7 and 12. Instead, it covers only tracks 4 and 7 and ends in a semicolon. It looks like the last page may have been omitted. Please clarify as soon as possible.

----- Original Message -----

From: Charles Montange

To: mclaren@pyco.com

Cc: Gary McLaren

Sent: Wednesday, October 08, 2008 10:45 AM

Subject: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

Tom, you indicated last week that SAW intended to supply a deed today (Oct. 8), in conformity to the Sept. 8, 2008, STB order. In order to understand the logistics, is this being delivered to Gary McLaren in Lubbock by hand, or is the delivery otherwise? We again suggest the prudence of sharing the form of deed/bill of sale with us first in order at least to try to negotiate any differences of opinion as to form.

McCain or Obama? Stay updated on coverage of the Presidential race while you browse - Download it now!

Exhibit D - Oct. 9 emails (PYCO and SAW counsel)

Charles Montange

From: "Charles Montange" <c.montange@verizon.net>
To: <mcfarland@aol.com>
Cc: "Gary McLaren" <gmclaren@sbcglobal.net>
Sent: Thursday, October 09, 2008 10:38 AM
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

The deed description is two pages, and covers real estate and improvements for tracks 4, 7 and 12, with 12 on the second page. The bill of sale description covers rail, ties, ballast and OTM for tracks 4 and 7. It is one page long, ends in a semicolon, and says nothing of 12.

I do not understand how "one of the tracks is encompassed in the deed" answers this question. If you mean that the deed includes improvements, and improvements include all rail, ties, ballast and OTM so the bill of sale is surplusage, then the entire bill of sale is redundant. Is that your position?

In all events, the bill of sale is defective in that it omits property SAW now claims it received from BNSF and for which PYCO paid when we acquired all-SAW.

----- Original Message -----

From: mcfarland@aol.com
To: c.montange@verizon.net
Cc: mcfarland@aol.com; gary.mclaren@sbcglobal.net; ed.landreth@bnsf.com
Sent: Thursday, October 09, 2008 6:27 AM
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

Mr. Ed Landreth, our consultant, says that there is no page missing from the bill of sale. One of the tracks is encompassed in the deed. What is your other issue?

Tom

Thomas F. McFarland
 Thomas F. McFarland, P.C.
 208 S. LaSalle St., #1890
 Chicago, IL 60604-1112
 (312) 236-0204
 (312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <c.montange@verizon.net>
To: mcfarland@aol.com
Sent: Wed, 8 Oct 2008 2:37 pm
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

If there is a way to let him know that we need a corrected bill of sale, and also an answer to the first issue in my email after receipt of his packet, please use it.

----- Original Message -----

From: mcfarland@aol.com
To: c.montange@verizon.net
Sent: Wednesday, October 08, 2008 12:21 PM

10/22/2008

Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

Tom will be back in the office Oct. 20th.

Kathy

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 S. LaSalle St., #1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <cmontange@pyco.net>
To: mcfarland@adn.com
Sent: Wed, 8 Oct 2008 1:30 pm
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

See subsequent email. I acknowledge receipt, but do have two comments, one a request for clarification, the other a note that the bill of sale legal description appears to be in error (omits a page). When will Tom be back?

----- Original Message -----

From: mcfarland@adn.com
To: cmontange@pyco.net
Sent: Wednesday, October 08, 2008 11:28 AM
Subject: Re: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

Tom is out of the office, so I am responding for him. The deed was confirmed delivered today 10-8 by UPS to you.

Kathy Lenihan
Sec'y to T McFarland

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 S. LaSalle St., #1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)

-----Original Message-----

From: Charles Montange <cmontange@pyco.net>
To: mcfarland@adn.com
Cc: Gary McLaren <gary.mclaren@pyco.net>
Sent: Wed, 8 Oct 2008 12:45 pm
Subject: PYCO--Feeder Line-- SAW, deed for Burris property, F.D. 34890

10/22/2008

Tom, you indicated last week that SAW intended to supply a deed today (Oct. 8), in conformity to the Sept. 8, 2008, STB order. In order to understand the logistics, is this being delivered to Gary McLaren in Lubbock by hand, or is the delivery otherwise? We again suggest the prudence of sharing the form of deed/bill of sale with us first in order at least to try to negotiate any differences of opinion as to form.

McCain or Obama? Stay updated on coverage of the Presidential race while you browse - [http://www.fox.com](#)

McCain or Obama? Stay updated on coverage of the Presidential race while you browse - [http://www.fox.com](#)

McCain or Obama? Stay updated on coverage of the Presidential race while you browse - [http://www.fox.com](#)

Exhibit E - SAW's Fifth Amended Original Petition in state court

NO. 2007-539,788

SOUTH PLAINS SWITCHING, LTD. CO.

v.

**BNSF RAILWAY COMPANY, f/k/a
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

§
§
§
§
§
§
§
§

IN THE 99TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RECORD CO.
DISTRICT CLERK
2008 MAY -2 PM 2:13
BY [Signature]
DEPUTY

**PLAINTIFF'S FIFTH
AMENDED ORIGINAL PETITION**

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), Plaintiff herein, files this, its Fifth Amended Original Petition, complaining of **BNSF RAILWAY COMPANY, f/k/a THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF"),** Defendant herein, and would show to the court as follows:

**I.
DISCOVERY LEVEL**

SOUTH PLAINS anticipates that discovery will be conducted under Level III of the applicable Texas Rules of Civil Procedure for the reason that the court has entered a Scheduling Order in this case.

**II.
PARTIES**

SOUTH PLAINS is a corporation created and authorized to do business in the State of Texas. Its principal place of business is in Lubbock, Lubbock County, Texas.

BNSF is a corporation created under the laws of Delaware and authorized to do business in the State of Texas. No service of process is necessary on **BNSF** as **BNSF** has already entered an appearance in this case.

COPY

III.
JURISDICTION AND VENUE

This court has jurisdiction of this matter for the reason that the relief sought by **SOUTH PLAINS** is within the jurisdictional subject matter of this court and any damages sought herein are within the jurisdictional limits of this court.

Venue of this action is proper in Lubbock County. **SOUTH PLAINS'** principal place of business is located in Lubbock County. The acts, omissions and events giving rise to this case all occurred in Lubbock County. The obligations of the parties under their contract were to be performed in Lubbock County.

IV.
UNDERLYING FACTS

SOUTH PLAINS is a shortline railroad that operates over approximately thirteen miles of track in southeast Lubbock. **SOUTH PLAINS** served customers in the southeast part of Lubbock. **SOUTH PLAINS** was responsible for obtaining rail cars by interchanging the cars from **BNSF**, taking them to the customer, and then returning the rail cars to **BNSF** after the customer is finished either loading or unloading the rail car.

SOUTH PLAINS was formed in 1999 and began operations on July 5, 1999. **BNSF** and **SOUTH PLAINS** have a contractual relationship governed by an Asset Sale Agreement.

Property and real estate conveyed by **BNSF** to **SOUTH PLAINS** in 1999 is governed by a Quitclaim Deed and a Bill of Sale.

As a part of the Asset Sale Agreement entered into between **SOUTH PLAINS** and **BNSF**, **BNSF** quitclaimed certain real estate to **SOUTH PLAINS** by virtue of a Quitclaim Deed signed on May 18, 1999, by **BNSF**. The Quitclaim Deed conveyed to **SOUTH PLAINS** all of its right, title

and interest, in parcels of land located in Lubbock County as described in detail in an attachment to the Quitclaim Deed. The property conveyed covered several miles of track in the industrial area of southwest Lubbock.

As a part of Asset Sale Agreement, **BNSF**, by Bill of Sale, conveyed to **SOUTH PLAINS** all rail, ties, spikes, tie plates, rail anchors, turnouts, bridges, culverts, signaling equipment, and other supporting structures, ballast, other track materials and supplies and the metal depot at or near the old BN yard. The conveyance of the property set forth in the Bill of Sale was a conveyance of the turnout/switches allowing access to the rail tracks conveyed to **SOUTH PLAINS**.

The turnout/switches conveyed as a part of the Asset Sale Agreement and Bill of Sale were the following:

1. Turnout/Switch located at the west end of Track 340 ("West Turnout/Switch 340").
2. Turnout/Switch located at the east end of Track 340 ("East Turnout/Switch 340").
3. Turnout/Switch located at the east end of Track 320 ("East Turnout/Switch 320").
4. Turnout/Switch located at the west end of Track 320 ("West Turnout/Switch 320").
5. Turnout/Switch located at the west end of Track 330 ("West Turnout/Switch 330").
6. Turnout/Switch located at Track 310 ("Turnout/Switch 310").
7. Turnout/Switch at Track 9298 ("Turnout/Switch 9298").
8. Turnout/Switch at Track 355 at Burris ("Turnout/Switch 355").
9. Turnout/Switch at Track 352 at Burris ("Turnout/Switch 352").
10. Turnout/Switch to Tracks 7 and 12 at Burris ("Burris Switch").

On June 8, 2007, **BNSF** shut off and closed West Turnover/Switch 340. This turnout/switch was conveyed by **BNSF** to **SOUTH PLAINS** by the Asset Sale Agreement and the Bill of Sale. On

or about June 6, 2000, **BNSF** removed East Turnout/Switch 320. This turnout/switch was conveyed by **BNSF** to **SOUTH PLAINS** by the Assets Sale Agreement and the Bill of Sale. On or about September 22, 2000, **BNSF** removed West Turnout/Switch 320. This turnout/switch had been conveyed by **BNSF** to **SOUTH PLAINS** by virtue of the Asset Sale Agreement and the Bill of Sale. In October of 2003, **BNSF** removed West Turnout/Switch 330. This turnout/switch was conveyed by **BNSF** to **SOUTH PLAINS** by virtue of the Asset Sale Agreement and the Bill of Sale. At no time before any of these turnout/switches were removed, did **BNSF** obtain permission from **SOUTH PLAINS** to remove the turnout/switches.

Despite East Turnout/Switch 340 being owned by **SOUTH PLAINS** since November of 2007, **BNSF** has used East Turnout/Switch 340 to access Track 340, Turnout/Switch 355 and the Burris Turnout/Switch to access Jarvis Metals. These movements over the turnout/switches were not authorized by **SOUTH PLAINS** and is improper interference with and trespass upon the property of **SOUTH PLAINS**.

Despite Turnout/Switch 310 being owned by **SOUTH PLAINS** since November of 2007, Plainsmen Switching, under an agreement with **BNSF** has used the turnout/switch to access Track 310. This movement over the turnout/switch was not authorized by **SOUTH PLAINS**.

As a part of the Asset Sale Agreement, **BNSF** quitclaimed to **SOUTH PLAINS** three tracks located in Burris, Texas, being Tracks 4, 7 and 12. The ownership of these tracks has been the subject of previous litigation. In Tarrant County, **BNSF** sought a declaratory judgment that the conveyance was invalid due to a mutual mistake. The jury found and the court incorporated into its judgment, a finding that the conveyance of the tracks was not a mutual mistake. That portion of the court's judgment in Tarrant County was not appealed. Therefore, **SOUTH PLAINS** owns Tracks

4, 7 and 12 at Burris, and all of the turnout/switches allowing access to said tracks including Turnout/Switch 355, Turnout/Switch 352 and the Burris Turnout/Switch.

V.
CAUSES OF ACTION

Breach of Contract

BNSF and **SOUTH PLAINS** entered into an Agreement for the Sale of Certain Assets, Rights and Obligations of The Burlington Northern and Santa Fe Railway Company to South Plains Switching, Ltd. Co. ("Asset Sale Agreement"). As a part of the Asset Sale Agreement, **BNSF** conveyed to **SOUTH PLAINS**, by Bill of Sale, the turnout/switches described above. The removal of the turnout/switches, West 340, West 320, East 320 and West 330, was a breach by **BNSF** of the Asset Sale Agreement which has resulted in damages to **SOUTH PLAINS**.

Conversion

The removal of Turnout/Switches West 340, West 320, East 320 and West 330 by **BNSF** and the continual unlawful control of Turnout/Switches East 340, 310, 9298, 355, 352 and the turnout/switch to Tracks 7 and 12 at Burris, constitute **BNSF'S** wrongfully exercising dominion or control over the property of **SOUTH PLAINS**, to wit, the turnout/switches described above. **SOUTH PLAINS** has been damaged as a result of the conversion on the part of **BNSF** of each of the turnout/switches identified herein.

Trespass

The unlawful detention and use of the turnout/switches still in place constitutes trespass on the part of **BNSF**, and constitutes improper interference, improper possession and trespass of and upon Turnout/Switches East 340, 310, 9298, 355, 352 and the Burris Turnout/Switch.

The unlawful use by **BNSF** to service Jarvis Metals, over Track 4, 7 and 12, and the turnout/switches covering said tracks, constitutes improper trespass on the part of **BNSF**, and constitutes improper interference upon the property owned by **SOUTH PLAINS**. **BNSF**, or its contract designee, Plainsmen Switching, has trespassed continually over each of these turnout/switches from November, 2007, until the present time.

VI.
DECLARATORY JUDGMENT

SOUTH PLAINS seeks a declaratory judgment from this court that it owns the turnout/switches described herein. Under the Asset Sale Agreement, the Quitclaim Deed and the Bill of Sale, these turnout/switches were conveyed by **BNSF** to **SOUTH PLAINS**. Therefore, **SOUTH PLAINS** seeks a declaratory judgment from this court holding that **SOUTH PLAINS** is the owner of the turnout/switches in question.

VII.
ESTOPPEL

BNSF cannot raise the defense of limitations under the doctrine of equitable estoppel. **BNSF'S** representatives made one or more representations that the turnout/switches taken out in 2000 and 2003 would be replaced, which induced **SOUTH PLAINS** to delay filing suit on the turnout/switches until after limitations had apparently run. The fraudulent representations made by **BNSF'S** representatives were calculated to delay any action by **SOUTH PLAINS** in filing suit in connection with the turnout/switches that were removed in 2000 and 2003. The representations made by the representative of **BNSF**, combined with the refusal of **BNSF** to replace these turnout/switches, shows that **BNSF** induced **SOUTH PLAINS** to delay filing suit. **SOUTH PLAINS** detrimentally relied upon the misrepresentations of **BNSF'S** representative regarding the

turnout/switches. For all of these reasons, **BNSF** should be estopped from raising the statute of limitations defense herein.

VIII. **CONTINUOUS TORT**

BNSF cannot rely on the defense of limitations under the doctrine of continuous tort. The trespass of **BNSF**, or its contract designee Plainsmen Switching, over the turnout/switches owned by **SOUTH PLAINS** has been repeated over a period of time, including the period of time from November of 2007 until the present time. Each act of trespass creates a separate cause of action and the cause of action does not accrue, for purposes of limitations, until the misconduct ends. As of the date of the filing of this petition, both **BNSF** and Plainsmen Switching, its contract designee, are trespassing upon the turnout/switches owned by **SOUTH PLAINS**.

IX. **DAMAGES**

SOUTH PLAINS is entitled to recover damages for the turnout/switches that have been converted by **BNSF**. **SOUTH PLAINS** is entitled to recover damages for the breach of contract by **BNSF**. **SOUTH PLAINS** is entitled to recover damages resulting from the wrongful trespass on all the turnout/switches still in place by **BNSF** or its contract designee. **BNSF** is liable to **SOUTH PLAINS** for the market value of the turnout/switches, or, in the alternative, the replacement value of the turnout/switches, or, in the alternative, the actual or intrinsic value of the turnout/switches.

X. **EXEMPLARY DAMAGES**

BNSF was well aware that the turnout/switches set forth herein were conveyed to **SOUTH PLAINS** by virtue of the Asset Sale Agreement and the Bill of Sale. However, **BNSF** acted with

malice and removed the turnout/switches in violation of the rights of **SOUTH PLAINS**. Therefore, **BNSF** is liable to **SOUTH PLAINS** for exemplary damages.

BNSF was well aware that Turnout/Switches 9298, East 340, 310, 355, 352 and the turnout/switches at Burris Tracks 7 and 12 were conveyed to **SOUTH PLAINS** by the Asset Sale Agreement and by the Bill of Sale. However, **BNSF**, and its contract designee, Plainsmen Switching, continue to use these turnout/switches in violation of the rights of **SOUTH PLAINS**. **BNSF** has acted with malice in continuing to use these turnout/switches. Therefore, **BNSF** is liable for exemplary damages.

XI. **ATTORNEY'S FEES**

SOUTH PLAINS has retained the law firm of James L. Gorsuch, P.C., to represent it in the preparation and prosecution of this lawsuit and has agreed to pay such attorney reasonable and necessary fees that are equitable and just. Accordingly, **SOUTH PLAINS** asks the court to render judgment in favor of **SOUTH PLAINS** for reasonable and necessary attorney's fees, that are equitable and just, incurred in this proceeding.

XII. **PRAYER**

WHEREFORE, Premises Considered, SOUTH PLAINS requests:

1. That upon final hearing, **SOUTH PLAINS** have judgment against **BNSF** based on breach of contract, conversion, trespass, under the Declaratory Judgment Act and for damages resulting from the removal and continued control of the turnout/switches as set out herein.
2. That **SOUTH PLAINS** recover any and all damages it has sustained resulting from the actions of **BNSF** in removing the turnout/switches, including but not limited to, the market value of the turnout/switches, the replacement value of the turnout/switches or in the alternative, the actual intrinsic value of the

turnout/switches, any attorney's fees, pre-judgment and post-judgment interest, and any other and further relief to which **SOUTH PLAINS** may show itself to be entitled.

Respectfully submitted,

JAMES L. GORSUCH, P.C.
4412 74th Street, Suite B-102
Lubbock, Texas 79424
Telephone: (806)771-6474
Telecopier: (806)771-6476

By: 
James L. Gorsuch
State Bar No. 08221250

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Fifth Amended Original Petition has been served on opposing counsel on the 2nd day of May, 2008:

CM/RRR 7002 0860 0004 6835 2827

Mr. Donald E. Herrmann
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102

CM/RRR 7002 0860 0004 6835 2834

Mr. D. Thomas Johnson
McWHORTER, COBB AND JOHNSON, L.L.P.
P.O. Box 2547
Lubbock, Texas 79408-2547


James L. Gorsuch

Exhibit F - Wisener affidavit in state court

NO. 2007-539,788

| | | |
|---|----------|-----------------------------------|
| SOUTH PLAINS SWITCHING, LTD. CO. | § | IN THE 99TH DISTRICT COURT |
| | § | |
| v. | § | OF |
| | § | |
| BNSF RAILWAY COMPANY, f/k/a | § | |
| THE BURLINGTON NORTHERN AND | § | |
| SANTA FE RAILWAY COMPANY | § | LUBBOCK COUNTY, TEXAS |

EXHIBIT "A"
AFFIDAVIT OF LARRY WISENER

IN SUPPORT OF THE RESPONSE to the Second Motion for Summary Judgment and the Supplement to the Second Motion for Summary Judgment of BSNF RAILWAY COMPANY, f/k/a THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF"), filed by SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), before me, the undersigned authority, personally appeared Larry Wisener, who, being by me first duly sworn, deposed and stated as follows:

"My name is Larry Wisener. I am over the age of twenty-one years. I am of sound mind. I am fully competent to make this affidavit. I have personal knowledge of every statement made herein and every statement made herein is true and correct.

"Reference is made to my affidavit attached as Exhibit "A" to the Response to the Motion for Summary Judgment of BNSF filed by South Plains on February 22, 2008. I adopt all of the matters set forth in that affidavit as well as the attachments to the affidavit ("my first affidavit").

"In 1999, South Plains was formed to purchase rail track owned by The Burlington Northern & Santa Fe Railway Company in east Lubbock. Pursuant to the Asset Sale Agreement, South Plains purchased rail property and personalty items owned by BNSF to operate a shortline railroad in east Lubbock.

"At all times since 1993, I have been the Chief Executive Officer of South Plains Lamesa Railroad with its headquarters in Slaton, Texas. Since 1999, I have been the Chief Executive Officer, with the exception of a short period in 2005 and 2006, of South Plains. In that position, I am familiar with the various transactions

of South Plains with BNSF, I am familiar with the Asset Sale Agreement between the parties, the parcels of real estate and rail sold as a result of the Asset Sale Agreement and the items of personalty conveyed by BNSF to South Plains and in general, the business dealings between South Plains and BNSF.

"Also during this time period, I ran a track building business. I was in charge of and responsible for building track in many areas in West Texas and New Mexico. As such, I am familiar with the process of building track, the materials used in the track, and the different type of track configurations, their names and identifications, that are used in building track.

"Attached to my first affidavit is a true and correct copy of the Asset Sale Agreement between South Plains and BNSF. The Asset Sale Agreement covered the sale of assets from BNSF to South Plains in order for South Plains to operate a shortline railroad in the east Lubbock area. Under the Asset Sale Agreement, all assets to be conveyed were either real estate, conveyed by a Quitclaim Deed or personal property of BNSF conveyed by a Bill of Sale. The Bill of Sale is attached as Exhibit "2" to my first affidavit. The Bill of Sale includes 'turnouts', which are also known as switches.

"The turnout/switches covered by the Bill of Sale were the turnout/switch located at Track 9298, the west end of Track 340, the east end of Track 340, the east end of Track 320, the west end of Track 320, Track 330, Track 310, Track 352, Track 355, and a turnout/switch to Tracks 7 and 12 at Burris, Texas. Each of these turnout/switches allowed trains to move from the BNSF main line over to the rail line conveyed to South Plains with the exception of one of the turnout/switches at Burris, Texas. Each of the turnout/switches, with the exception of the one at Burris, Texas, was essential for South Plains to reach its own tracks and to service customers off of the main line of BNSF. South Plains therefore owns each of the turnout/switches set out herein.

"On or about June 6, 2000, BNSF removed the east Turnout/Switch 320. On or about September 22, 2000, BNSF removed the west Turnout/Switch 320. In October of 2003, BNSF removed the west Turnout/Switch 330. Each of these turnout/switches were removed by BNSF without the permission of South Plains. Each of the turnout/switches set out above were owned by South Plains at the time and were removed by BNSF, even though they were conveyed to South Plains under the Asset Sale Agreement and the Bill of Sale. Each of the turnout/switches removed led to track that was conveyed by BNSF to South Plains by the Asset Sale Agreement and the Bill of Sale.

"At the time of the beginning of the operation of South Plains, the shortline representative of BNSF dealing with South Plains was Allen Roach. He was the contact person with BNSF if South Plains had any problems with its operations with BNSF.

"Shortly after, BNSF removed Turnout/Switch 320, I called Allen Roach on behalf of South Plains and asked why this was done. I stated to him that South Plains needed Turnout/Switch 320 to adequately serve a customer, Pyco Industries. At that time, he indicated he would investigate to see if the turnout/switch could be placed back in. Later, after the west Turnout/Switch 320 had been removed, I wrote Allen Roach a letter. The letter is attached as Exhibit "3" to my first affidavit. I also attempted to call the local Road Master, Victor Lopez, of BNSF, about the removal of the turnout/ switches but he did not return my phone calls.

"South Plains had a concern that these turnout/switches were removed despite being conveyed to South Plains by the Bill of Sale. South Plains had a concern that it would not be able to provide service to Pyco Industries and other customers if these turnout/switches were not replaced. The two turnout/switches could have been used to serve Farmers Compress No. 2.

"In addition, South Plains had a concern that from the date of start up, BNSF refused to allow South Plains to exercise three miles of track rights it held on the main line of BNSF, granted by an exemption filed at The Surface Transportation Board. The Exemption is attached as Exhibit "4" to my first affidavit.

"Allen Roach responded to me and told me it was not wise at the time to 'raise any problem' with the turnout/switches, he also stated that the switches would be taken care of down the line and that they would be put back in when the question of the northside tracks was settled.

"At the time, South Plains was interested in acquiring the trackage of BNSF on the north side of Lubbock in order to run its shortline operations. Allen Roach told me not to make any objections with regard to the removal of the turnout/switches until the northside deal was complete and South Plains was running its trains over the tracks in the north side of Lubbock.

"I had several conversations with Allen Roach to this effect regarding the turnout/switches that had been removed. In each conversation, Allen Roach told me not to press the issue or to take any action because it might hurt or jeopardize South Plains in being awarded the northside trackage.

"Relying on Allen Roach's representations made on behalf of BNSF, South Plains did not pursue any action against BNSF at the time for the removal of the turnout/switches. Had these representations by Allen Roach not been made, South Plains would have acted earlier in filing suit based on the removed turnout/switches. At the time, neither I nor South Plains had any knowledge as to whether or not BNSF was actually going to replace the turnout/switches even though it was promised to me that the turnout/switches would be replaced.

"The northside tracks in Lubbock were never conveyed to South Plains even though at a meeting in Fort Worth, it was announced to a group of people by a BNSF representative that the northside tracks were to be transferred to South Plains.

"On more than one occasion, Allen Roach stated that the removed turnout/switches would be dealt with at a later date, when the northside tracks had been conveyed to South Plains. Contrary to these statements, neither Allen Roach nor BNSF ever made any attempt to remedy the removal of the turnout/switches with South Plains or to compensate South Plains for the removal of the turnout/switches. The turnout/switches have not been replaced as of this date, nor has South Plains received any compensation for the value of the removed turnout/switches.

"It came to the attention of South Plains that BNSF removed the turnout/switch at the west end of 330 in October of 2003. To date, that switch has not been replaced nor has South Plains been compensated for the removal of that turnout/switch.

"After litigation commenced between South Plains and BNSF, BNSF contacted South Plains by letter and advised South Plains that its employees were not to contact any personnel at BNSF. I did not feel that we could make a demand for the replacement of the turnout/switches after the receipt of this letter.

"In June of 2007, BNSF incapacitated the turnout/switch at the west end of Track 340. This turnout/switch was disabled without any permission of South Plains. To date, the turnout/switch is still disabled and South Plains has not received any compensation for the value of the turnout/switch.


"In November of 2007, pursuant to an order of The Surface Transportation Board, South Plains sold much of its trackage and real estate to Pyco Industries, Inc. Since that date, BNSF and its contract designee, Plainsmen Switching, owned by Pyco Industries, have continued to use the Turnout/Switch 310, 9298, east 340, 352, 355, and the turnout/switch to Tracks 7 and 12 at Burris, Texas, for operations, without the permission of South Plains. This use of the turnout/switches by BNSF and Pyco Switching has occurred continuously since November of 2007, on almost a daily basis, and continues to this day. To date, South Plains has received no compensation from BNSF for its use of the turnout/switches.

"Since November of 2007, BNSF has detained and exercised control over the turnout/switches listed above. South Plains has not had access to the switches in order to either sell or find a market for the turnout/switches since that time. The refusal of BNSF to turn over the turnout/switches to South Plains has resulted in damages to South Plains.

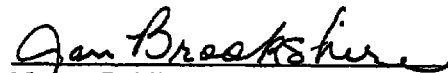
"Based on my experience in track building, and my knowledge of the cost of track materials and track configurations, it is my opinion that each of the

turnout/switches that were removed by BNSF, and each of the turnout/switches that are still in place, have a market value of approximately \$75,000.00 to \$80,000.00, plus the cost of ballast."

FURTHER AFFIANT SAYETH NOT.


LARRY WISENER

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on the 1st day of May, 2008, by Larry Wisener.


Notary Public, State of Texas



NO. 2007-539,788

SOUTH PLAINS SWITCHING, LTD. CO.

v.

**BNSF RAILWAY COMPANY, f/k/a
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

§
§
§
§
§
§
§

IN THE 99TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RELING
BY DISTRICT CLERK LUBBOCK COUNTY
2008 JUN 11 PM 12:28
Brenda S. Sweeney

PLAINTIFF'S THIRD SUPPLEMENTAL PETITION

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), Plaintiff herein, files this, its Third Supplemental Petition, thereby supplementing its Fifth Amended Original Petition, filed on May 2, 2008, and its Second Supplemental Petition filed on June 3, 2008, and would show to the court as follows:

I.
ADOPTION

SOUTH PLAINS adopts each and all of the facts and allegations set forth in Plaintiff's Fifth Amended Original Petition and Plaintiff's Second Supplemental Petition on file herein, and seeks all relief by this Supplemental Petition as was sought in Plaintiff's Fifth Amended Original Petition and Plaintiff's Second Supplemental Petition.

II.
DAMAGES

In addition to the allegations set forth regarding damages in the Fifth Amended Original Petition, **SOUTH PLAINS** seeks damages for the market value of the turnout/switches, or in the alternative, the replacement value of the turnout/switches, or in the alternative, the actual intrinsic value of the turnout/switches. **SOUTH PLAINS** seeks total damages from **BNSF** in the sum of

COPY

\$668,000.00. This damage figure is reached by calculating the market value of \$80,000.00 for the West Turnout/Switch 340, the East Turnout Switch 340, the East Turnout/Switch 320, the West Turnout/Switch 320, the West Turnout/Switch 330, Turnout/Switch 310, Turnout/Switch 9295, and Turnout/Switch 355. The market value of the Turnout/Switch 352 is \$28,000.00. Therefore, the total damages sought by **SOUTH PLAINS** in connection with the market value of the turnout/switches is \$668,000.00.

WHEREFORE, Premises Considered, SOUTH PLAINS prays that the court grant judgment in favor of **SOUTH PLAINS** and against **BNSF** for all amounts sought in Plaintiff's Fifth Amended Original Petition, Plaintiff's Second Supplemental Petition and this Third Supplemental Petition.

Respectfully submitted,

JAMES L. GORSUCH, P.C.

4412 74th Street, Suite B-102

Lubbock, Texas 79424

Telephone: (806)771-6474

Telecopier: (806)771-6476

By: 
James L. Gorsuch
State Bar No. 08221250

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Third Supplemental Petition has been served on opposing counsel on the 11th day of June, 2008:

CM/RRR 7002 0860 0004 6835 3008

Mr. Donald E. Herrmann

KELLY, HART & HALLMAN, P.C.

201 Main Street, Suite 2500

Fort Worth, Texas 76102

CM/RRR 7002 0860 0004 6835 3015

Mr. D. Thomas Johnson

McWHORTER, COBB AND JOHNSON, L.L.P.

P.O. Box 2547

Lubbock, Texas 79408-2547

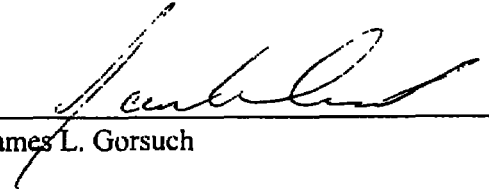

James L. Gorsuch

Exhibit G

PYCO Intervention Petition
in state court litigation

| | | |
|----------------------------------|---|--|
| SOUTH PLAINS SWITCHING, LTD. CO. | § | IN THE 99 TH DISTRICT COURT |
| | § | |
| <i>Plaintiff</i> | § | |
| | § | |
| vs. | § | |
| | § | OF |
| BNSF RAILWAY COMPANY, f/k/a | § | |
| THE BURLINGTON NORTHERN AND | § | |
| SANTA FE RAILWAY COMPANY | § | |
| | § | |
| <i>Defendant</i> | § | LUBBOCK COUNTY, TEXAS |

**PYCO INDUSTRIES, INC.'S ORIGINAL
PETITION IN INTERVENTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes Intervenor, PYCO INDUSTRIES, INC. ("PYCO") and files this Original Petition In Intervention in the subject cause and respectfully shows the Court as follows:

Discovery Level

1. This suit is governed under Level 3 of the Texas Rules of Civil Procedure. A Scheduling Order has been entered in the case.

Parties

2. Intervenor PYCO is a Texas corporation organized under the Texas Non-Profit Corporation Act, with its principal place of business located in Lubbock, Lubbock County, Texas.
3. Plaintiff SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS") is a corporation created and authorized to do business in the State of Texas. Its principal place of business is in Lubbock, Lubbock County, Texas. Pursuant to Texas Rules of Civil Procedure 21 and 21a, SOUTH PLAINS will be served by PYCO without citation, through certified mail, return

receipt requested. to its legal counsel in this cause, Mr. James L. Gorsuch, James L. Gorsuch, P.C., 4412 74th Street, Suite B-102, Lubbock, Texas 79424

4. Defendant BNSF RAILWAY COMPANY, f/k/a THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF") is a corporation created under the laws of Delaware and authorized to do business in the State of Texas. Pursuant to Texas Rules of Civil Procedure 21 and 21a, BNSF will be served without citation by serving its legal counsel of record in this cause, Mr. Donald E. Herrmann, Kelly Hart & Hallman, L.L.P., 201 Main Street, Suite 2500, Fort Worth, Texas 76102.

Venue

5. Venue is proper in this Court as previously established by the original parties to the cause, assuming this Court has jurisdiction over the subject matter.

Jurisdiction

6. Pursuant to 49 U.S.C. 10501(b), the United States Surface Transportation Board ("STB") has jurisdiction over railroad transportation (including facilities) that is "exclusive" and preempts all other federal and state remedies. Pursuant to 49 U.S.C. 10907, STB can order the transfer of railroad property from a carrier to a shipper, shipper association, or another carrier which files a feeder line application on terms and conditions set by the agency. Pursuant to the Hobbs Act, 28 U.S.C. 2341, et seq., only United States Courts of Appeal have jurisdiction to review decisions issued by the STB.
7. Under the circumstances, and insofar as this proceeding relates to PYCO's interests, this Court's jurisdiction is limited to determining whether BNSF conveyed certain mainline switches to SOUTH PLAINS in 1999. If this Court determines that BNSF did, then this

Court lacks jurisdiction to deviate from the STB orders, and must enter an order quieting title in all the switches in PYCO. rather than SOUTH PLAINS, effective November 9, 2007. Moreover, only STB has jurisdiction to determine the value that PYCO must pay for any interest of SOUTH PLAINS in the switches. STB has already done so. PYCO has paid that value. Any contention by SOUTH PLAINS to the contrary is an attack on STB's jurisdiction and orders. If SOUTH PLAINS believes it has not been adequately compensated, it must seek to reopen the relevant STB feeder line proceeding (STB Finance Docket 34890). In short, insofar as PYCO's interests are concerned, this Court's jurisdiction is limited to determining whether BNSF conveyed title to the switches to SOUTH PLAINS, and if BNSF did, then this Court lacks jurisdiction to declare that SOUTH PLAINS owns the switches, for after November 9, 2007, all interests of SOUTH PLAINS in same belong to PYCO. All other SOUTH PLAINS' claims must be dismissed for lack of jurisdiction.

8. This intervention is not an admission of jurisdiction of this Court to act inconsistent with STB's exclusive jurisdiction pursuant to 49 U.S.C. 10501(b) and 49 U.S.C. 10907, nor an admission that this Court has jurisdiction to afford SOUTH PLAINS any remedy as against PYCO that, among other things, awards any damages to SOUTH PLAINS or declares that SOUTH PLAINS has any title to any switches at issue in this proceeding. This intervention is without prejudice to PYCO's rights to pursue relief at STB and in other courts with jurisdiction.

Intervenor's Interest

9. PYCO's interests are directly affected by this proceeding. As part of its efforts to obtain redress under federal rail transportation law for inadequate rail service by SOUTH PLAINS

in Lubbock, PYCO filed a “feeder line proceeding” pursuant to 49 U.S.C. 10907 at the STB. STB determined that SOUTH PLAINS provided inadequate rail service to a majority of its shippers in Lubbock.

10. In a Decision served August 31, 2007, in PYCO Industries - Feeder Line Application – Lines of South Plains Switching, F.D. 34890, STB set the terms and conditions (including price) for the sale within 90 days of all of SOUTH PLAINS to either PYCO or Keokuk Junction Railway Co. In particular, STB set the value for all SOUTH PLAINS’ rail property still under SOUTH PLAINS’ ownership as set forth in an inventory prepared and filed by SOUTH PLAINS with STB. PYCO accepted the price established by STB for all of SOUTH PLAINS, and in addition purchased certain additional interests from SOUTH PLAINS. SOUTH PLAINS elected to transfer its lines to PYCO. At a closing on November 9, 2007, SOUTH PLAINS quitclaimed its interests in Lubbock to PYCO. PYCO assumed all common carrier obligations of SOUTH PLAINS, and initially contracted with West Texas & Lubbock Railway to discharge those obligations. PYCO subsequently organized a division called Plainsman Switching to discharge all PYCO’s common carrier obligations. SOUTH PLAINS no longer provides railroad services in Lubbock, let alone any services involving any of the switches at issue in this proceeding.
11. Subsequent to the transfer of all of its assets to PYCO, SOUTH PLAINS took the position that it did not have to convey certain properties known as the “Burris” properties. PYCO sought an order from STB clarifying that SOUTH PLAINS must convey such property. At about the same time, PYCO learned that SOUTH PLAINS also claimed that it owned the mainline switches to all the trackage connecting PYCO’s tracks to the BNSF mainline.

PYCO also sought an order clarifying that all those interests now belonged to PYCO. In a Decision served September 8, 2008, in F.D. 34890, STB ordered SOUTH PLAINS to convey all the Burris property to PYCO by October 8, 2008, retroactive to the original date of closing (November 9, 2007). As to the switch issue, STB stated that it was for a state court to determine if BNSF ever conveyed the mainline switches to SOUTH PLAINS in the first place, but if BNSF did, then all those switches must be conveyed to PYCO as part of the original transaction. STB indicated that it expected the parties to negotiate a solution along those lines. PYCO attempted to negotiate with SOUTH PLAINS, but SOUTH PLAINS refused, claiming to own the switches and improperly demanding compensation.

12. On October 8, 2008, SOUTH PLAINS tendered PYCO a quitclaim deed and bill of sale for the Burris properties, but the bill of sale is defective. In addition, SOUTH PLAINS included a cover letter asserting that it “declines [PYCO’s] request for a conveyance or assignment of SAW’s [SOUTH PLAINS] interest in switches....” SOUTH PLAINS’ cover letter asserts that “disposition of switches is initially a matter for a Texas Court.” In an email on October 9, 2008, SOUTH PLAINS’ attorney confirmed that SOUTH PLAINS continued to claim ownership of the switches, continued to demand more compensation, and refused conveyance of its interests to PYCO.
13. In this state court proceeding, SOUTH PLAINS states that it “seeks a declaratory judgment from this court holding that [SOUTH PLAINS] is the owner of the turnout/switches in question.” SOUTH PLAINS Fifth Pet. p. 6. This relief is barred by the STB orders. PYCO owns the turnout/switches in question.

14. Further, SOUTH PLAINS states that PYCO (through Plainsman Switching) “has trespassed continually over each of these turnout/switches from November, 2007, until the present time. SOUTH PLAINS Fifth Pet. p. 6. This statement is wrong for multiple reasons, but more significantly, it is fatally inconsistent with STB orders. A claim for damages for trespass in the SOUTH PLAINS Fifth Pet. p. 7 (second sentence of part IX) is similarly wrong, as well as fatally inconsistent with STB orders, as applied to PYCO (which SOUTH PLAINS appears to refer to as BNSF’s “contract designee”).
15. In this lawsuit, SOUTH PLAINS also claims that PYCO has engaged in a continuous tort “over a period of time, including the period of time from November of 2007 until the present time.” SOUTH PLAINS Fifth Pet. p. 7. This statement is wrong for multiple reasons, but more significantly, it is fatally inconsistent with STB orders.
16. SOUTH PLAINS prays for damages from BNSF for alleged conversion of the mainline switches. SOUTH PLAINS Fifth Pet. at p. 7. If SOUTH PLAINS has any entitlement to the value of the switches, that value must be paid to PYCO, for PYCO purchased all interests of SOUTH PLAINS pursuant to STB orders in F.D. 34890.
17. SOUTH PLAINS also claims that BNSF and PYCO “continue to use these turnout/switches in violation of the rights of [SOUTH PLAINS].” SOUTH PLAINS alleges that BNSF acts with “malice” and seeks exemplary damages. SOUTH PLAINS Fifth Pet. at p. 8. SOUTH PLAINS’ allegation of “malice” and claim for exemplary damages is subject to many flaws, including inconsistency with STB jurisdiction and orders. However, since the switches belong to PYCO, obviously any exemplary damages must be paid to PYCO for any “malice” after the date PYCO acquired the switches, or was entitled to acquire the switches (which STB has

determined was November 9, 2007). However, PYCO is not aware of any malicious use of the switches by BNSF before or after that date.

18. SOUTH PLAINS purports to seek attorneys fees at p. 8 of its Fifth Amended Petition. Inasmuch as the relief sought by SOUTH PLAINS is patently and fatally inconsistent with STB's orders and jurisdiction, SOUTH PLAINS should pay the attorneys' fees of PYCO.

Intervenor's Cause of Action

19. PYCO understands BNSF to contend that it never conveyed any of the switches at issue in this case to SOUTH PLAINS by virtue of the quitclaim deed and bill of sale in 1999. Upon examination of the title documents, and consistent with railroad practices generally, PYCO agrees with BNSF's position that BNSF did not convey these mainline switches to SOUTH PLAINS. There is no fair reading of the deed, the bill of sale, or the underlying contract which would support any other conclusion. Moreover, PYCO is unaware of any instance in which a railroad has sold switches on its mainline to a local terminal railroad operator like SOUTH PLAINS. But if for some reason SOUTH PLAINS were correct that BNSF did convey to SOUTH PLAINS the mainline switches at issue here, then pursuant to STB decisions in F.D. 34890, SOUTH PLAINS must be deemed to have conveyed same to PYCO on November 9, 2007. Moreover, PYCO has fully paid for those switches. If SOUTH PLAINS desires any further compensation for the switches, it must seek to reopen STB F.D. 34890 for that purpose. Under ordinary rules governing reopening final administrative proceedings, SOUTH PLAINS has no basis to seek reopening. This entire state proceeding is an unlawful attempt to circumvent STB jurisdiction insofar as it seeks any "compensation" for the value of the switches. Any ownership interest of SOUTH PLAINS is now PYCO's.

Continued litigation of SOUTH PLAINS' unreasonable claims concerning ownership imposes an unnecessary burden on rail shippers in Lubbock.

Prayer

WHEREFORE PREMISES CONSIDERED, Intervenor PYCO asks the Court to render judgment for PYCO, should this Court determine that BNSF conveyed the subject switches to SOUTH PLAINS, by entering an order quieting title in all subject switches to PYCO effective November 9, 2007, and for such other and further relief to which PYCO may show itself entitled.

Respectfully submitted.

PHILLIPS & McLAREN, L.L.P.
3305 66th Street, Suite 1A
Lubbock, Texas 79413
Telephone: (806) 788-0609
Facsimile: (806) 785-2521

By: _____
Gary R. McLaren
State Bar Number 00791232

ATTORNEYS FOR INTERVENOR

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing has been mailed to all counsel of record as follows on this the ____ day of October, 2008:

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Gary R. McLaren

Exhibit E

Nov. 10 Letter from State Court
scheduling trial



SAM MEDINA
DISTRICT JUDGE

STATE OF TEXAS
237TH JUDICIAL DISTRICT OF TEXAS
(LUBBOCK COUNTY COURTHOUSE - SIXTH FLOOR)
P.O. Box 10536
LUBBOCK, TEXAS 79408
(806) 775-1027
Fax (806) 767-9658

TERRI RAMSEY
OFFICIAL COURT REPORTER

SYLVIA JUAREZ
COURT COORDINATOR

November 10, 2008

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RE: Cause No. 2007-539,788 - *South Plains Switching, Ltd., Co. V. BNSF Railway, Co.* - In the
237th District Court of Lubbock County, Texas

Dear Counsel:

This letter serves to confirm the trial date setting for **Monday, April 6, 2009** regarding the
above-referenced matter. The pretrial conference is set for March 27, 2009 at 9:00 o'clock a.m.

Sincerely,


Sylvia Juarez, Court Coordinator
237th District Court